IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 36 OF 2007

Mr. Jeron J. W. Barretto,
R/o H. No. 363,
Muthal-Sadolxem,
Canacona-Goa. ... Petitioner

versus

1. Judicial Magistrate First Class,
   at Canacona, Shekher Parab.

2. State of Goa,
   through Chief Secretariat,
   Alto-Porvorim,
   Bardez-Goa, 403 521.

3. Mr. Nazario Pinto,
   R/o H. No.435,
   Gunnea Vaddo,
   Near Pinto Bar,
   Varca, Salcete-Goa. ... Respondents

Mr. Vivek Rodrigues, Advocate for the Petitioner.

CORAM : N. A. BRITTO, J.

DATE : 22ND OCTOBER, 2007.

ORAL ORDER

Heard Mr. Vivek Rodrigues, the learned Counsel on behalf of the Petitioner. Mr. Rodrigues, has made it clear that in view of some action taken against Respondent No.1, the Petitioner will restrict his petition only to reliefs of prayers (A) and (E) which read as follows:-

A. This H'ble Court be kindly pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction, quashing and setting aside the Impugned order dated 06.07.07, passed by the Respondent No.1.

E. This H'ble Court be kindly commit the Respondent No. 3 in jail to serve the sentence.

2. This petition is filed by the Complainant in Criminal case No.76/N/04 essentially for cancellation of a bailable warrant issued against the Complainant, with the allegation that the warrant was issued against the Complainant in a disposed off case pursuant to the Order of the learned J.M.F.C. dated 6-7-2007. It is contended on behalf of the Complainant that the said order is totally perverse and mala fide and contrary to Section 418 of the Code of Criminal Procedure, 1973.

3. Records and proceedings were called for, and I have perused the same.

4. There is no dispute that the accused in the said case was convicted under Section 138 of the Negotiable Instruments Act, 1881 to undergo S.I. for a period of six months and to pay compensation of

Rs.2,30,000/- in default to undergo further imprisonment of two months, by virtue of Order dated 16-1-2006 of the learned J.M.F.C., Canacona.

5. The accused preferred an appeal to the Court of Sessions, Margao and the said appeal came to be dismissed by Order dated 21-12-2006 of the learned Sessions Judge, Margao. The said Order has thus become final. After the dismissal of the appeal, the learned Sessions Judge had directed the accused to surrender before the trial Court on 3-1-2007 at 10 a.m.

6. However, when the proceedings were taken up before the trial Court on the said date, the records show that the accused was absent and a NBW was ordered to be issued against the accused and notice to his surety. Admittedly, the Complainant did not remain present before the trial Court on that day and one does not know why. Ordinarily, a Complainant would have remained present to ensure the execution of the order passed.

7. On 29-1-2007 the NBW issued to the accused was returned unexecuted stating that the accused was not found at the given address and notice issued to the surety Ivo Barretto was duly served but he remained absent.

8. The case was again taken up on 21-2-2007 before the learned trial Court but it so happened that the Presiding Officer of the trial Court was absent on that day. Next, on 2-3-2007 when the case was again taken up it

was noted that the accused had remained absent as the warrant was unexecuted and the surety had also remained absent. Therefore the learned J.M.F.C. ordered a notice to be issued to the Complainant to take steps and for payment of process fee and the case was fixed on 26-3-2007.

9. On 26-3-2007, the records show that the Complainant was duly served by notice and had remained absent nor was represented by any Advocate. It was also noted that the accused was absent on many occasions and NBW issued against the accused was returned unexecuted and therefore it was ordered that the Complainant should take steps and the matter was adjourned for the Complainant to take steps on 15-6-2007.

10. Again, when the case was taken up on 15-6-2007, the Court noted that the Complainant as well as the Complainant's Advocate was absent and so also the accused. The Court further noted that as per the endorsement of the Police the accused was residing at Mumbai. The Court also noted that the Complainant had remained absent nor was represented by any lawyer nor had paid any process fees nor had taken any steps and therefore the trial Court was pleased to give yet another opportunity to the Complainant to take steps and fix the case on 6-7-2007.

11. When the case was taken up on 6-7-2007 the learned trial Court again found that the Complainant was absent nor was represented by the Advocate. The Court also noticed that the accused remained absent on many occasions. The Court noted that the Complainant had not taken any steps

nor process fee was paid and therefore was pleased to issue bailable warrant against the Complainant in the sum of Rs.500/-. It is this bailable warrant which is sought to be cancelled or quashed by writ of certiorari in terms of prayer (A) of the petition. As far as prayer (E) is concerned i.e. the execution of the sentence imposed upon the accused/Respondent no.3, it is needless to observe that the right forum to execute the same is the trial Court passing the sentence in terms of Sub-Section(1) of Section 418 of the Code and not this Court in its extraordinary jurisdiction.

12. Records also show that the notice dated 23-6-2007 issued to the Complainant was returned by the Police Inspector, Canacona stating that it was duly served and in fact there is no reference to service of notice on the Complainant either in the synopsis to the petition or in the petition itself. This is a clear attempt to indulge in “suppressio veri, suggestio falsi”. It is only on 17-10-2007 that the Complainant's wife and attorney who was appearing on behalf of the Complainant, has filed an affidavit stating that after the disposal of the appeal neither the petitioner nor she nor any member of her family(which includes her brother-in-law, sister-in-law and mother-in-law) had received any notice from the Canacona Court in connection with Criminal Case No.76/N/04. It is also stated that the learned Presiding Officer i.e. Respondent No.1 who was in connivance with the Police was neglecting to issue warrant against Respondent No.3/Accused. In **D. P. Chadha** v. **Triyugi Narain Mishra and others**(AIR 2001 SC 457) the Hon'ble Supreme Court has reiterated the principle that the statement of facts recorded by a Court or Quasi-Judicial Tribunal in its proceedings as regards the matters

which transpired during the hearing before it would not be permitted to be assailed as incorrect unless steps are taken before the same forum. It may be open to a party to bring such statement to the notice of the Court/Tribunal and to have it deleted or amended. It is not, therefore, open to the parties or the Counsel to say that the proceedings recorded by the Tribunal are incorrect. The notice shows that it was received at the Complainant's house. The affidavit filed, at the most could be taken as filed by the Complainant's wife/attorney and not other members of the family.

13. It may be true that the Complainant is abroad but the records certainly show that on behalf of the Complainant notice was served on the Complainant before the bailable warrant was issued to the Complainant. It was certainly expected of the Complainant or the Complainant's Advocate to have approached the trial Court and get the said bailable warrant cancelled in case it was wrongly issued or otherwise. This the Complainant did not do nor his/her Advocate. The Complainant and/or the Complainant's Advocate did not verify the records and proceedings of C. C. No.76/N/04 before filing the petition. In case the records were not correct it was the duty of the Complainant and/or his Advocate to have brought to the notice of the trial Court and get it corrected. There is no doubt that it was the duty of the trial Court to ensure that the sentence imposed was executed by it and that without any reference to the Complainant but it does appear from the records that the learned Magistrate initially did that and only later when he found that the warrant against the accused could not be executed thought of seeking assistance from the Complainant first by issuing notice to him and upon his

failure to attend issuing a bailable warrant which could have been easily got cancelled by the Complainant and/or the Complainant's Advocate by approaching the trial Court. The records of the case as reproduced herein above show that the learned Presiding Officer did show lot of indulgence to the Complainant before he issued the said bailable warrant. It does not show any malice or perversity on the part of the learned Magistrate in issuing the bailable warrant. Every wrong order need not be imputed with malice.

14. The petition is supported by an affidavit filed by the Petitioner's Advocate who has lot of grievances against the learned Magistrate(Respondent No.1) but a petition of this type is not certainly a mode to air out the said grievances.

15. There is no substance in this petition. Hence, the same is hereby dismissed in limine.

N. A. BRITTO, J.

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